

Message Text

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ACTION ARA-10

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FM AMEMBASSY SANTIAGO

TO SECSTATE WASHDC 1566

C O N F I D E N T I A L SECTION 1 OF 2 SANTIAGO 9432

E. O. 11652: GDS

TAGS: PGOV, PINT, SHUM, CI

SUBJECT: ANALYSIS OF ACT ON CHILEAN CONSTITUTIONAL RIGHTS AND
DUTIES.

REF: SANTIAGO 9001

1. SUMMARY: THE MOST LENGTHY OF THE THREE CONSTITUTIONAL ACTS
ANNOUNCED BY PRESIDENT PINOCHET ON SEPTEMBER 11 CONCERNED
CONSTITUTIONAL RIGHTS AND DUTIES. CHILEAN CONSTITUTIONAL LAWYERS
ARE STILL STUDYING THE RAMIFICATIONS OF ITS MANY PROVISIONS. OUR
ANALYSIS MUST STILL BE CONSIDERED PRELIMINARY AND SUBJECT TO CHANGE
IN LIGHT OF LEGAL EXPERTS' ASSESSMENTS. WE HAVE NOW TAKEN
A POINT-BY-POINT LOOK AT THE ACT AND COMPARED IT WITH THE PROVISIONS
OF THE OLD CONSTITUTION IT RESCINDS. WE WILL SUBMIT THE DETAILED
ASSESSMENT BY AIRGRAM.

2. THE ACT FITS IN WITH THE PRESIDENT'S CALL FOR A "NEW DEMOCRACY"
AND THE END OF IDIOLOGICALLY NEUTRAL INSTITUTIONS. IF THE GOC HAD
INTENDED ONLY TO EXTEND AND STRENGTHEN THE RIGHTS PROVIDED IN THE
OLD CONSTITUTION, THAT TEXT COULD EASILY HAVE BEEN AMENDED. BUT
THE NEW ACT AIMS TO STRIKE A NEW BALANCE BETWEEN LIBERTY ON THE ONE
HAND, AND AUTHORITY AND NATIONAL SECURITY ON THE OTHER,
REFLECTING CHILE'S RECENT HISTORY AS REVIEWED BY THE MILITARY AND
THEIR CONSERVATIVE SUPPORTERS. AS A RESULT, THE STATE BECOMES MORE
AUTHORITARIAN. THE NEW ACT INTRODUCES THE CONCEPT OF SUPERIOR
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NATIONAL VALUES REQUIRING CITIZENS' ALLEGIANCE, AND IT OUTLAWS

ALL ACTIONS OPPOSED TO CERTAIN DOCTRINAL BELIEFS OR TO THE CONSTITUTED REGIME. IN ADDITION, SPECIFIC LIMITATIONS HAVE BEEN INTRODUCED UPON A NUMBER OF RIGHTS PREVIOUSLY INVIOLEATE OR, MORE GENERALLY, PREVIOUSLY QUALIFIED ONLY IN NARROW TERMS.

3. ON THE OTHER HAND, THE ACT AIMS TO INCREASE THE ABILITY OF A CITIZEN TO OBTAIN EFFECTIVE REMEDY WHEN HIS RIGHTS ARE ABUSED BY GOVERNMENT OR FELLOW CITIZENS. UNLIKE EARLIER THEORETIC PRONOUNCEMENTS OF THE JUNTA, MANY PARTS OF THIS ACT ARE NOW LEGALLY BINDING GUIDELINES. BOTH THE PEOPLE AND THE STATE CAN BE EXPECTED TO AVAIL THEMSELVES OF ITS PROVISIONS, ALTHOUGH MANY OF THE TOUCHIER ONES MUST AWAIT IMPLEMENTING LEGISLATION OR THE END OF EMERGENCY RULE BEFORE WE CAN SEE HOW THEY WILL BE APPLIED IN PRACTICE. BUT SOME GROUND RULES HAVE NOW BEEN LAID DOWN, AND WE DOUBT THAT THE JUNTA WILL AMEND THIS DOCUMENT FRIVOLOUSLY. END SUMMARY.

4. CONSTITUTIONAL ACT THREE CONTAINS TWELVE ARTICLES DIVIDED INTO FOUR CHAPTERS: RIGHTS AND GUARANTEES, LEGAL RECOURSE, DUTIES, AND GENERAL PROVISIONS. IT SUPERSEDES ARTICLES 10-20 OF THE EXISTING CONSTITUTION EXCEPT FOR TWO CLAUSES CONTINUING SPECIAL TAX TREATMENT AND OTHER CURRENT RIGHTS FOR RELIGIOUS PROPERTY. THIS EXCEPTION CARRIES FORWARD RELIGIOUS GUARANTEES STEMMING FROM THE 1933 REVISION OF THE CONSTITUTION, WHICH DISESTABLISHED AN OFFICIAL CHURCH. THE SO-CALLED 1925 CONSTITUTION HAS BEEN SUBSTANTIALLY REVISED A NUMBER TIMES, MOST RECENTLY IN 1971.

5. THE ACT ENTERED INTO FORCE ON SEPTEMBER 18, EXCEPT AS SPECIFICALLY PROVIDED TO ALLOW FOR DRAFTING OF IMPLEMENTING CODES OR LEGISLATION. CONSTITUTIONAL ACT FOUR ON EMERGENCY POWERS MANDATES TWO OTHER EXCEPTIONS TO ENTRY INTO FORCE: DURING PERIODS OF EMERGENCY THEY EXTEND THE TIME A PERSON MAY BE HELD INCOMMUNICADO AND LIMIT JUDICIAL ACTIONS ON INTERNAL SECURITY MATTERS. MOREOVER, THE ACT EXPLICITLY CONTINUES TO HOLD IN ABEYANCE THE POLITICAL RIGHTS DESCRIBED IN ARTICLE NINE OF THE 1925 CONSTITUTION.

6. THE PREAMBLE SUCCINCTLY LAYS OUT THE RATIONALE, OBJECTIVES AND MOST SIGNIFICANT INNOVATIONS OF THE ACT. THE ESSENTIAL BASIS FOR GOVERNMENT IS THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS. CONFIDENTIAL

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THIS PINCPLE, IT SAYS, TRADITIONALLY HAS BEEN RECOGNIZED IN CHILE. BUT THE BITTER EXPERIENCE OF THE YEARS BEFORE 1973 DEMONSTRATED THE NEED TO FORTIFY AND PREFECT THE RIGHTS IN THE 1925 CONSTITUTION AND INCORPORATE NEW GUARANTEES IN KEEPING WITH CONTEMPORARY DOCTRINE AND INTERNATIONAL STANDARDS. AMONG THESE NEW RIGHTS ARE THAT TO LIFE AND PERSONAL INTEGRITY, LEGAL PROTECTION FOR THE FETUS, EQUALITY OF THE SEXES, ACCESS TO THE COURTS, AND THE RIGHT OF SELF-DEFENSE. LACK OF CONSIDERATION AND RESPECT FOR THE PRIVATE

LIVES OF PEOPLE, THEIR FAMILIES AND THEIR HONOR, CHARACTERISTIC OF THE PREVIOUS PERIOD, REQUIRE CONSTITUTIONAL PROTECTION OF THESE RIGHTS. SINCE FREEDOM OF EXPRESSION IS ONE OF THE MOST IMPORTANT RIGHTS, IT IS NECESSARY TO REAFFIRM IT, BUT AT THE SAME TIME ENSURE THAT IT IS NOT ABUSED TO THE POINT OF DAMAGING INDIVIDUAL RIGHTS OR THE HIGHER VALUES OF THE COMMUNITY. IN ADDITION, THE RIGHT TO PUBLIC INSTRUCTION AND EDUCATION -- WITH THE CORRESPONDING OBLIGATION TO PROVIDE IT -- IS A NATIONAL RESPONSIBILITY. NONETHELESS PARENTS HAVE THE PRIMARY RIGHT AND OBLIGATION WITH RESPECT TO THEIR CHILDREN. FUTURE ECONOMIC AND SOCIAL DEVELOPMENT REQUIRES A CLEAR DEFINITION OF, AND ADEQUATE PROTECTION FOR, THE RIGHT TO HOLD PROPERTY. THE STATE ALSO HAS A DUTY TO PROTECT AGAINST ENVIRONMENTAL POLLUTION.

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7. BUT, THE PREAMBLE CONTINUES, THESE RIGHTS CAN ONLY BE EFFECTIVE IF INDIVIDUALS ARE ABLE TO SECURE THEIR ENFORCEMENT. A NEW LEGAL PROCEDURE ("RECURSO DE PROTECCION") FOR HUMAN RIGHTS WILL BE DEvised FOR SITUATIONS WHERE THE NATURE OF THE RIGHT PERMITS IT. AS A FURTHER STEP TO PROTECTING THE FUNDAMENTAL VALUES OF SOCIETY

,
ANY ACTIONS BY PERSONS OR GROUPS TO EXPOUND DOCTRINES AIMED AT DAMAGING THE FAMILY, PROPOSING VIOLENCE OR A CONCEPT OF SOCIETY BASED ON CLASS STRUGGLE OR DOCTRINES OPPOSED TO THE CONSTITUTED REGIME -- ARE ILLICIT AND AGAINST THE INSTITUTIONAL ORDER. FOR THE SAME REASON, NO ONE CAN INVOKE A CONSTITUTIONAL OR LEGAL PRINCIPLE TO THREATEN THE RIGHTS OF CITIZENS OR TO ACT AGAINST THE INTEGRITY OR FUNCTIONING OF THE STATE OR THE CONSTITUTED

REGIME. THE CITIZENS' DUTIES INCLUDE: HONORING NATIONAL EMBLEMS AND THE FATHERLAND, DEFENDING ITS SOVEREIGNTY AND INTEGRITY, CONTRIBUTING TO THE NATIONAL DEFENSE, PAYING TAXES AND OBEYING ORDERS OF LEGALLY CONSTITUTED AUTHORITY. FURTHERMORE, CITIZENS HAVE THE CONSTITUTIONAL OBLIGATION TO FEED, EDUCATE AND PROTECT THEIR CHILDREN, AND MINOR CHILDREN THE OBLIGATION TO HONOR AND SUPPORT THEIR PARENTS. THE FOREGOING DUTIES ARE WITHOUT PREJUDICE TO OTHERS WHICH MAY BE REQUIRED BY LAW.

8. WE WOULD SUMMARIZE AS FOLLOWS OUR CONCEPTION OF THE PLUSES AND MINUSES IN THE ACT -- AS VIEWED FROM THE PERSPECTIVE OF THE 1925 CONSTITUTION. ON THE PLUS SIDE IS PROVIDES FOR: A) EQUALITY BETWEEN SEXES (ALTHOUGH TRANSITIONAL ARTICLE 1 SETS NO DATE FOR CONFIDENTIAL

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IMPLEMENTING LEGISLATION); B) PUBLIC DEFENDERS (MENTIONED IN CURRENT REGULATIONS BUT NOT ENFORCED); C) A POSITIVE RIGHT TO BAIL OR BOND AS OPPOSED TO THE POSSIBILITY THEREOF (IMPLEMENTATION PENDING FUTURE LAW); D) COMPENSATION FOR UNJUST TREATMENT (IN THE OLD DOCUMENT BUT NOT ENFORCED); E) INDIVIDUAL AND FAMILY RIGHT TO PRIVACY AND HONOR; G) AN OBLIGATION ON PUBLIC OFFICIALS TO RESPOND TO PETITIONS; AND G) PROMPTER AND MORE EFFECTIVE COMPENSATION IN CASES OF EXPROPRIATION. IN ADDITION, THE SUPREME COURT IS TO ARRANGE TO MAKE AVAILABLE A HABEAS CORPUS-TYPE LEGAL PROCEDURE FOR THOSE SEEKING REDRESS FOR DEPRIVATION OF A NUMBER OF RIGHTS.

9. IN REFTEL THE EMBASSY ERRONEOUSLY REPORTED THAT PROTECTION AGAINST SELF-INCRIMINATION AND EX POST FACTO PROSECUTION HAD BEEN DIMINISHED, BY APPLICION UNDER THE ACT ONLY TO CRIMINAL CASES. ACCORDING TO LOCAL LAWYERS, HOWEVER, THE COURTS IN PRACTICE HAVE REFUSED TO ACCEPT AN EX POST FACTO DEFENSE IN CIVIL CASES SINCE THE LATE 1920'S. IN CRIMINAL CASES, THE NEW ACT ACTUALLY STRENGTHENS EX POST FACTO PROTECTION. WITH REGARD TO SELF-INCRIMINATION, THE 1925 CONSTITUTION HAD LIMITED PROTECTION TO CRIMINAL CASES. BUT THE SAME SECTION OF THE CONSTITUTION HAD PROHIBITED CONFISCATION OF PROPERTY AS A PUNISHMENT. THE NEW ACT ALSO DEALS WITH SELF-INCRIMINATION AND CONFISCATORY PUNISHMENT IN THE SAME CLAUSE -- IT SPECIALLY PERMITS CONFISCATION OF PROPERTY IN CASES INVOLVING ILLICIT ASSOCIATIONS.

10. AS FOR RESTRICTING LIBERTIES, THERE IS A BLANKET PROHIBITION AGAINST ANY ACT AIMED AT "SPREADING DOCTRINES THAT TEND AGAINST THE FAMILY, PROPOSE VIOLENCE OR A CONCEPT OF SOCIETY BASED ON CLASS STRUGGLE" OR ARE OTHERWISE CONTRARY TO THE CONSTITUTED REGIME. NO CONSTITUTIONAL OR LEGAL PRECEPT CAN BE INVOKED TO JUSTIFY SUCH ACTIONS. THE MEANING OF "CONSTITUTED REGIME" HAS NOT BEEN SPELLED OUT. IF IT MEANS THE WHOLE PHILOSOPHY OF THE GOVERNMENT, SOME SPECULATE THAT ADVOCACY OF THE DOCTRINE OF REPRESENTATIVE DEMOCRACY COULD FALL UNDER THE BAN. ADDITIONALLY, JUDGES MAY EXTEND FROM 48 HOURS TO FIVE DAYS THE TIME A PERSON

MAY BE HELD BEFORE BEING BOUND OVER TO A JUDGE. SPECIFIC REFERENCE IN THE 1925 CONSTITUTION TO EXILING AND DEPRIVATION OF CITIZENSHIP AS SANCTIONS TO BE DETERMINED BY LAW ARE DELETED.

11. ALL ORGANIZATIONS CONTRARY TO "PUBLIC MORALS, ORDER OF NATIONAL SECURITY" ARE NOW PROSCRIBED. COURTS ARE GIVEN AUTHORITY TO PREVENT CONFIDENTIAL

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PUBLICATON OF BROADCAST IN CASES AFFECTING PUBLIC ORDER, MORALITY, NATIONAL SECURITY OR PERSONAL PRIVACY. A NATIONAL RADIO AND TELEVISION COUNCIL IS TO BE FORMED WITHIN THE NEXT YEAR EMPOWERED TO ENSURE COMPLIANCE WITH THE ELECTRONIC MEDIA'S INFORMATIONAL ROLE AND TO PROMOTE THE EDUCATIONAL OBJECTIVES OF THE ACT -- PRESUMABLY THE VALUES PROCLAIMED IN OTHER CONSTITUTIONAL ACTS AND EARLIER POLICY PAPERS ON THE ROLE AND OBJECTIVE OF THE STATE. LABOR EFFECTIVELY LOSES THE RIGHT TO STRIKE THROUGH SPECIFIC PROHIBITIONS COVERING BROAD AREAS, AND GUARANTEED LEGAL ENFORCEMENT OF COMPULSORY ARBITRATION IN OTHER LABOR DISPUTES.

12. OTHER SIGNIFICANT CHANGES NOT SO EASY TO CATEGORIZE INCLUDE, ANTI-ABORTION PROVISIONS AND AN EXPANDED RIGHT OF REPLY (TO BE CARRIED BY ALL NEWSPAPERS IF REPLY IS SOUGHT TO ONE ITEM IN A PARTICULAR PAPER, OR ALL RADIO STATIONS IF CARRIED INITIALLY BY ONE STATION). THE ACT INTRODUCES A DISTINCTION BETWEEN RIGHTS TO EDUCATION AND TO TEACH; THESE HAD BEEN LUMPED TOGETHER IN THE 1925 CONSTITUTION. EDUCATION NOW IS PRIMARILY THE RESPONSIBILITY OF THE PARENT RATHER THAN THAT STATE, ALTHOUGH THE GOVERNMENT WILL PROVIDE FREE BASIC EDUCATION. THE NEW ACT OMITTS GUIDELINES ON TEACHING, STATING ONLY THAT A NEW CODE ON THE SUBJECT IS TO BE GRAFTED. SKEPTICS POINT OUT THAT "RIGHTS TO TEACH" WILL NOT ENJOY WHATEVER ADDITIONAL LEGITIMACY DERIVES FROM APPEARING SPECIFICALLY IN THE CONSTITUTIONAL DOCUMENT. IN THE ABSENCE OF GUARANTEES THEY EXPRESS CONCERN THAT THE PROPOSED CODE WILL PROVIDE MORE RESTRAINTS THAT RIGHTS ON TEACHING.

13. FINALLY, THE ACT INTRODUCED A CONSOLIDATED LIST OF DUTIES OF THE CITIZENRY. SUCH DUTIES AS PAYING TAXES AND ACCEPTING MILITARY SERVICE HAD BEEN SCATTERED THROUGHTOUT THE 1925 CONSTITUTION

.
THE NEW ONE REQUIRES RESPECT FOR NATIONAL SYMBOLS AND IMPOSES A "FUNDAMENTAL DUTY" TO "HONOR THE FATHERLAND," DEFEND ITS SOVERIGNTY AND TERRITORIAL INTEGRITY, AND "CONTRIBUTE TO PRESERVING NATIONAL SECURITY" AND THE "ESSENTIAL VALUES OF THE CHILEAN TRADITION."

14. WE BELIEVE A PARTICULAR ILLUSTRATIVE EXAMPLE OF THIS GOVERNMENT'S MIND-SET IS REVEALED IN ARTICLE 9 OF THE ACT. IT IMPOSES ON CHILDREN THE CONSTITUTIONAL OBLIGATION OF "HONORING" THEIR PARENTS, HELPING THEM IN TIME OF NEED, AND "WHILE MINORS, CONFIDENTIAL

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RESPECTING THEIR LEGITIMATE AUTHORITY." PRESUMABLY, THIS IS ONE
OF FEW FUNDAMENTAL ACTS IN THE WORLD IMPOSING OBLIGATIONS UPON
MINORS.
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